

Before The
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Pioneer's)
Preference Rules)

ET Docket No. 93-266

To: The Commission

Comments of Associated Communications Corporation

Associated Communications Corporation ("Associated"),¹ herein submits its comments in response to the above-captioned Notice of Proposed Rule Making in which the Commission has initiated a review of its Pioneer's Preference Rules.² Associated strongly opposes the retroactive application of any modification of such rules, particularly with respect to the tentative pioneer's preference awards made in the broadband personal communications services ("PCS") proceeding.

The Commission seeks comment on whether any repeal or amendment of its pioneer's preference rules should apply to the tentative conclusion that preferences should be awarded to three applicants in the 2 GHz broadband PCS proceeding.³ The reason

¹Associated Communications Corporation is a publicly-traded Delaware corporation.

²Review of Pioneer's Preference Rules, Notice of Proposed Rulemaking, ET Docket No. 93-266, FCC 93-477 (released October 21, 1993) ("Notice").

³Notice at ¶19; Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative (continued...)

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for the Commission's review of its pioneer's preference rules is the forthcoming implementation of competitive bidding as the means of selecting licensees from among mutually exclusive applicants. The Commission questions whether, as a general matter, the implementation of competitive bidding vitiates the purpose of and/or need for the pioneer's preference rules.

In its discussion, the Commission explores the notion that the use of competitive bidding might make the pioneer's preference rules unnecessary because an innovator would be able to obtain a license by outbidding other mutually exclusive applicants.⁴ The Commission further conjectures that "the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s)."⁵

This "connection" between competitive bidding and the purpose of pioneer's preferences is strained and tenuous. In particular, competitive bidding does nothing to provide a significant reward to induce innovators to present their innovations to the Commission in a timely manner. Nor does it provide the Commission with the benefits of the research, development and experimentation of innovations so that such matters may prompt or be considered in the formulation of rules

³(...continued)
Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) ("Tentative Decision").

⁴Notice at ¶7.

⁵Id.

and policies to govern a new service. By the time the competitive bidding occurs, the Commission will have already gone through a notice of proposed rulemaking, the comments generated thereby and established the rules to govern a new service - all without the benefits it would obtain from innovators seeking a pioneer's preference.

Even accepting the Commission's hypothesis at face value, it is not reasonable to simply assume that financing sources are more likely to fund the bidding of an innovator as opposed to any other qualified applicant. The notion that a start-up innovator is being rewarded by having to outbid companies with vastly larger resources is absurd. Moreover, funding a bidding contest is nowhere near as attractive as funding an innovator who has received a dispositive pioneer's licensing preference. In particular, where the rules for a new service are already established, it is unclear why an innovator would have any advantage in obtaining funding for its bidding.

Moreover, there is no reliable correlation between the value of an innovation to the Commission whose mandate is governed by the public interest and the value of the same innovation to a potential investor whose motivation is governed by a profit motive. While the advent of competitive bidding may change the licensing landscape for the Commission, it has no significant effect on the Commission's policies and rules whose purpose is to encourage and reward innovators.

In promulgating its pioneer's preference rules, the

Commission made clear that the purpose of pioneer's preferences was to encourage and foster new and innovative communications services and to provide a significant reward to induce innovators to present their innovations to the Commission in a timely manner.⁶ The Commission established standards, procedures and deadlines to govern requests for pioneer's preferences. Numerous companies have expended considerable funds, time and effort in the research, development and presentation of innovations in the area of broadband PCS. The Commission has reviewed the 57 broadband PCS requests and tentatively concluded that it should award three pioneer's preferences.⁷

While opinions may differ on whether certain pioneer's preference requests should have been granted and others denied, it is indisputable that all companies filing such requests relied exclusively and justifiably on the fact that one or more pioneer's preference awards for broadband PCS innovations were possible. In the face of this reliance, Associated submits that it would be grossly unfair, if not unlawful, for the Commission to retroactively apply any such repeal or amendment to these

⁶Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order, 6 FCC Rcd 3488, 3490 (1991).

⁷Although the Commission received 96 pioneer's preference requests, only 57 were accepted by the Office of Engineering and Technology. See Notice, Statement of Commissioner Andrew C. Barrett at n.2 ("Barrett Statement").

tentative awards.⁸

The retroactive application of any repeal or modification of the competitive bidding rules to the pioneer's preference requests in the 2 GHz broadband PCS proceeding would be unjust for another reason as well. The pioneer's preference rules induced potential pioneers to publicly disclose their innovations by holding out the prospect of a dispositive PCS licensing preference in a self-selected market area. Associated submits that it is naive to believe that innovators would simply reveal their innovations in the public marketplace of ideas without the reasonable prospect of a significant reward. This is precisely why pioneer's preferences were instituted.

It would be unjust for the Commission to have induced PCS pioneers to publicly disclose their innovations by offering the prospect of a dispositive licensing preference and then withdraw that prospect. The Commission induced pioneers to conduct and report on experiments and trials which were instrumental in the Commission's development of its rules for commercial PCS. Having incorporated the information submitted by these pioneers into the PCS rules, the Commission cannot fairly deny them the prospect of the promised reward. The fact that the

⁸Associated agrees with Commissioner Barrett's position that:

[g]iven the millions of dollars spent by numerous large and small entities to provide experimental PCS information and innovative service concepts, I believe this action constitutes the ultimate public policy "bait and switch."

Barrett Statement at ¶1.

pioneer's preference rules have already served their purpose by inducing potential PCS pioneers to file preference requests requires that the Commission honor that inducement by either granting or denying the pending requests based on their merits.

The equities are even stronger in the case of the recipients of tentative pioneer's preference awards who have been led to believe that absent a reversal on the merits, they would be receiving the preferences. It is not unreasonable to subject these applicants to the risk that the Commission may reconsider its tentative conclusions that their contributions qualify as pioneering innovations. However, it is grossly unfair to make them bear the risk that the Commission may diminish the reward or eliminate the possibility of a pioneer's preference altogether. These tentatively selected applicants have expended great sums of money in justifiable reliance on the fact that the only issue left to be decided by the Commission was whether or not their contributions qualify as pioneering innovations.⁹

The Commission also distinguishes between the grant of a pioneer's preference to MTel, Inc. in the 900 MHz narrowband PCS context and the tentative pioneer's preference grants in the 2 GHz broadband PCS context for purposes of applying the current pioneer's preference rules. This distinction is neither fair nor

⁹Also in this regard, the Commission should not renege on the nature of the preference. For example, in its July 16, 1992, Notice of Proposed Rulemaking in GEN Docket 90-314, the Commission proposed 30 MHz PCS assignments and in its October 8, 1992, Tentative Decision, the Commission tentatively awarded PCS pioneer's preferences for such proposed 30 MHz licenses.

consistent. As noted by Commissioner Barrett, the Commission granted the MTel preference in June, 1993, at a time when it was clearly aware that both the House of Representatives and the Senate had already passed the legislation authorizing competitive bidding.¹⁰ Moreover, the delay in final action on the pending broadband PCS requests is not the fault of the requesting parties. All the information needed from these parties had been submitted in a timely manner to the Commission such that final action could have been taken well before the competitive bidding authority became effective. It was the Commission itself that delayed final action on these requests even though it knew that both legislative chambers had already passed the subject legislation and competitive bidding authority was imminent.

Finally, in order for a pioneer's preference to properly reward a PCS innovator, the amount and spectral location of the frequencies assigned to the innovator should reflect the innovation upon which the pioneer's preference request was based. For example, in the case of Omnipoint Corporation, the tentative broadband PCS pioneer's preference award was based on its innovative equipment development.¹¹ Omnipoint's innovations were specifically designed for use at 1850-1990 MHz and optimized for

¹⁰Barrett Statement at n.7; See also Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, Report and Order, 8 FCC Rcd 7162, ¶¶ 62-72 (1993).

¹¹Tentative Decision at 7802-7803.

use with a total of 30 MHz per operator.¹² Accordingly, Omnipoint should be awarded a preference for a 30 MHz license in the 1850-1990 MHz band in its requested geographic market area.¹³

Wherefore, for the foregoing reasons, Associated strongly opposes the retroactive application of any repeal or modification of the pioneer's preference rules, particularly with respect to the tentative pioneer's preference awards made in the broadband PCS proceeding.

Respectfully submitted,

ASSOCIATED COMMUNICATIONS
CORPORATION

By: David Berkman
David Berkman
Executive Vice President

Date: November 15, 1993

¹²Letter dated September 29, 1993, from Douglas G. Smith, President of Omnipoint, to William F. Caton, Secretary, Federal Communications Commission, filed in GEN Docket No. 90-314, at 3, 6 ("Omnipoint Letter"). In the case of Omnipoint, a 30 MHz license in the 1850-1990 MHz band is also justified by the administrative record. In accordance with the Commission's rules, on June 25, 1992, Omnipoint specified 30 MHz in the 1850-1990 MHz band as "the frequencies it proposes to use." 47 C.F.R §1.402(a); See Omnipoint Letter at 6.

¹³Associated notes that one proposal being discussed by other parties would involve the "carving out" of the core Basic Trading Area ("BTA") within the Major Trading Area ("MTA") that contains the geographic market area designated by the applicant. In this arrangement, the Commission would award a pioneer's preference for a 30 MHz broadband PCS license within a BTA. The remainder of the MTA for purposes of the spectrum block in question would be subject to the competitive bidding procedures applicable to MTAs. This "carving out" of a BTA would only occur in MTAs where a pioneer's preference award is implicated.